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Arb.Original Petition (Com.Div.) No. 681 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

Arb.Original Petition (Com.Div.) No.681 of 2022

M/s.Vishnusurya Projects and Infra Private Limited,
Having its registered address at
Temple Towers 2nd Floor,
New No.76, North Mada Street,
Mylapore,
Chennai-600 004.

... Petitioner

Versus

1. M/s.ITNL KMB (JV),
No.1, A.E.Koil Street,
New Washermanpet,
Cross Road, (Opp Periyar Park),
Chennai-600 081.

2. M/s.ITNL KMB (JV),
The IL& FS Financial Centre,
Plot C22, G Block,
Bandra Kurla Complex,
Bandra East, Mumbari-500 051,
Maharashtra, India.

3. IL&FS Transportation Network Limited,
The IL&FS Financial Centre,
Bandra Kurla Complex,
Bandra East, Mumbari-500 051,
Maharashtra, India.
Respondents

...



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PRAYER: The Original Petition has been filed under Section 11(6) of Arbitration and Conciliation Act, 1996, to appoint an Arbitrator in accordance with the Letter of Award (LoA) dated 15.4.2019.

For Petitioner : Mr.A.K.Mylsamy

For Respondents : Mr.P.R.Raman, Sr,Counsel for
M/s.Ram and Associates-R1&R2
No appearance for R3

ORDER

The present Original Petition has been filed under Section 11 (6) of Arbitration and Conciliation Act, 1996 (in short, 'the Act'), seeking to appoint an Arbitrator in accordance with the Letter of Award (LoA) dated 15.4.2019

2.1.The petitioner is a part of AGNI group, who undertakes turnkey projects in large infrastructure constructions, expertised in building residential and construction projects. The 1st respondent is a Joint Venture who entered into an agreement dated 01.02.2017 with Chennai Metro Rail Limited (CMRL) and subsequently entered into an Addendum No.1 dated 28.02.2018 for design validation and construction of works of underground station and other works at Sri Thiyakaraya College and Korukkupet Station. The 1st respondent sub-



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contracted a part of the balance works at the said Station to the petitioner which was also approved by CMRL by a letter dated 12.04.2019 and subsequently the 1st respondent issued a letter of Award (LOA) dated 15.04.2019.

2.2. On completion of services, the petitioner had raised various invoices on a monthly basis from May 2019 to Dec 2019 for a total sum of Rs.8,60,56,174/- which was acknowledged by 1st respondent and verified by CMRL. The 1st respondent made payments on adhoc basis for a sum of Rs.7,33,30,849/- leaving a balance due of Rs.1,27,25,325/- along with GST of Rs.92,20,306/- which was also paid by the petitioner, which, the 1st respondent is liable to pay. However, all of a sudden, the 1st respondent unlawfully terminated the contract in the month of February 2020. According to the petitioner, he had rendered various other services and completed works prior to the abrupt termination for a total sum of Rs. 1,29,10,939/- inclusive of GST which remains uncertified and unbilled. Hence the petitioner has incurred huge loss in rendering the services in spite of non-receipt of payment. The 1st respondent has miserably failed to make payments with malafide intention by causing wrongful loss to the petitioner by making empty promises and now the total sum of Rs. 2,56,36,264/- is due and payable by the 1st respondent.

2.3. The petitioner then sent a notice through his Counsel dated



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06.01.2021 calling upon the 1st respondent to pay the total sum of Rs.2,56,36,264/- along with 24% interest. However the 1st respondent refused to pay the same. Hence, invoking the arbitration clause contained in the LOA, the petitioner sent a notice dated 08.08.2022 for appointment of arbitrator and also nominated Hon'ble Justice Mr. P.Shanmugam, Retired Judge of High Court, Madras as Arbitrator to adjudicate the disputes and requested the respondent to nominate another arbitrator within 30 days from the receipt of notice. The said notice was returned for 'insufficient address' but it is pertinent to note that the notice was sent to the same address as provided by the 1st respondent itself in all communications with the CMRL by the petitioner throughout when the contract was existing. Further a notice dated 16.08.2022 was sent to R2 and R3, which is the head office of the 1st respondent which was duly served, but received no response from the respondents. Then once again another notice was sent to the R1 on 08.10.2022 which was also returned with endorsement 'Addressee Left'. Hence, having no other recourse, the petitioner is constrained to file this petition seeking appointment of arbitrator.

3.1. According to the respondents, the 2nd respondent is a Joint Venture company between 3rd respondent and a Ukrainian company ("KMB") having its registered office at The IL & FS Financial Centre, Mumbai and



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having its local office at Chennai, which is the 1st respondent. The 1st respondent (R1) and the 2nd respondent (R2) are not separate entities and are one and the same. The petitioner has wrongly added the R1 as a party to the present proceedings which is nothing but the local address of R2, whereas, R3 is a company registered under the Companies Act, 1956 and one of the group companies belonging to IL&FS group.

3.2. According to the respondents, the present petition is liable to be dismissed in limine as it is not maintainable both in law and on facts. Since the original tender was awarded by CMRL to the R2, the petitioner is added as a party by way of sub-contracting the tender to him. Hence CMRL is a necessary party for the proceedings herein and thus the present petition is liable to be dismissed on the grounds of non-joinder of a proper and necessary party. Further it is liable to be dismissed as the Hon'ble NCLAT by way of order dated 15.10.2018 in Company Appeal (AT) No.346 of 2018, in "*UOI vs. Infrastructure Leasing and Financial Services Ltd. & Ors.*", has granted stay of institution or continuation of suit or any other proceedings by any party or person or bank or company etc., against IL&FS and its 348 group companies including R3 herein which was subsequently confirmed by the Hon'ble NCLAT by order dated 12.03.2020.



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3.3 It is further stated that the respondents are not liable for CMRL not paying any alleged dues owned to the petitioner since it was due to the petitioner's failure to discharge and complete the works subcontracted to him, CMRL had terminated the tender. Even as per the Letter of Award dated 15.04.2019, the invoices raised by the petitioner has to be disbursed by CMRL and not by the 2nd respondent and the 2nd respondent has only sub-contracted the same to the petitioner. Therefore, since there is no liability on the part of the 2nd respondent to pay the dues, appointment of Arbitrator does not arise and hence, sought for dismissal of the petition.

5. Heard the learned counsel for the parties and perused the entire materials placed on record.

6. Mr.A.K.Mylsamy, learned counsel appearing for the petitioner would submit that the petitioner had rendered various services and completed the work prior to the abrupt termination and the respondents failed to make the payments for a total sum of Rs.2,56,36,264/- and caused wrongful loss to the petitioner. In these circumstances, the petitioner sent Section 21 notice dated



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06.01.2021 to the respondents, for which, the respondents sent a reply notice, dated nil, refusing the liability to pay the dues. The learned counsel would submit that the present dispute arises out of the Letter of Award, dated 15.04.2019, wherein, Clause 9 refers dispute resolution, by which, if any dispute or controversy arises between the parties, the same shall be referred for settlement by arbitration. Clause 9 contained in LoA, dated 15.04.2019, reads as under:

“9. Dispute Resolution:

If any dispute, controversy or differences arises between the parties as to the interpretation of terms and conditions of this Letter of Award/ subsequent mentor any matter or thing in connection herewith, the parties shall exert to solve the dispute or controversy or difference amicably. In case of such site or controversy cannot be solved by the parties through discussion th good faith attempting to reach an amicable solution, the same shall be referred for settlement by arbitration of three arbitrators, one each to be nominated by each party and the third arbitrator to be appointed by the said two nominated arbitrators. The arbitration proceedings shall be governed by the Indian Arbitration and Conciliation Act 1996 or any statute, amendment or enactment thereof The place of arbitration shall be at Chennai and the Hon'ble High Court of Madras alone shall have the jurisdiction.”



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7. By referring to the above said Clause, the learned counsel for the petitioner would submit that the present dispute is arbitrable and accordingly, the petitioner sent a notice dated 8.8.2022, bringing to the notice of the respondents that in terms of arbitral clause, Hon'ble Thiru Justice P.Shanmugam (Retd.Judge) was nominated as Arbitrator to adjudicate the dispute and called upon the 1st respondent to nominate an Arbitrator within 30 days. However, the respondents failed to nominate the Arbitrator. The said notice was returned with endorsement 'insufficient address'. The learned counsel would further submit that the nominated Arbitrator, Hon'ble Thiru Justice P.Shanmugam had passed away and despite the petitioner requested the respondents to nominate second Arbitrator of their choice, the respondents failed to nominate their arbitrator, the petitioner has come forward with the present application.

8. Mr.P.R.Raman, learned counsel appearing for the respondents would submit that he is in agreement with regard to the appointment of Arbitrator in terms of arbitral Clause contained in LoA, however, on the aspect of jurisdiction of the arbitrator to proceed with the arbitration is concerned, he



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would contend that in view of the interim order, dated 15.10.2018 passed by the NCLAT in Comp.Appeal No.346 of 2018, granting moratorium in favour of 3rd respondent and also as against the respondents 1 and 2, the claim of the petitioner cannot be arbitrated. The said interim order later came to be confirmed by NCLAT vide order dated 12.03.2020. Therefore, no arbitration proceedings can be initiated against the respondents. In this regard, the learned counsel referred to a judgment of the Delhi High Court in Arb.P.No.1166 of 2021, dated 21.12.2022 (***DLF Ltd. versus IL&FS Engineering and Construction Company***), wherein, the Delhi High Court has referred NCLAT order and held that no arbitration proceedings can be proceeded subsequent to the interim order passed by the NCLAT on or after 15.10.2018 against the respondents. Therefore, the learned counsel would urge this Court to dismiss the present application.

9. Heard Mr.A.K.Mylsamy, learned counsel for the petitioner and Mr.P.R.Ramann, learned counsel for the respondents and perused the materials available on record.

10. As regards the arbitration of the dispute, there is no dispute on



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either side, to be sorted out before the Arbitrator in terms of LoA, dated 15.4.2019. The only issue in the present case arises for consideration is whether subsequent to the moratorium granted by the NCLAT on 12.03.2020 and confirmed on 15.10.2018, this Court can nominate an Arbitrator and thereafter, can the Arbitrator commence the arbitral proceedings?

11. In the present case, the moratorium granted by the NCLAT vide interim order dated 12.03.2020 and confirmed on 15.10.2018 is with regard to the initiation of legal proceedings against the 3rd respondent herein and its 348 group companies as mentioned therein. No doubt, the said order will cover the respondents 1 and 2 also. To decide the issues which falls for consideration in this petition, it is worthwhile to extract the interim order dated 12.3.2020 passed by the NCLAT as under:

“Taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the Company and 348 group companies, there shall be stay of

(1) The institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against IL&FS and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and

(ii) Any action by any party or person or Bank or Company, etc. to foreclose, recover or enforce any security interest created over the



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assets of IL&FS' and its 348 group companies including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(iii) The acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations vailed by 'IL&FS' and its 348 group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein.

(iv) Suspension of temporarily the acceleration of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits and any other financial facility by the IL&FS' and its 348 group companies by any party or person or Bank or Company, etc, as of the date of first default. (v) Any and all banks, financial institutions from exercising the right to set off or lien against any amounts lying with any creditor against any dues whether principal or interest or otherwise against the balance lying in any bank accounts and deposits, whether current or savings or otherwise of the 'IL&FS and its 348 group companies.

The interim order will continue until further orders and not be applicable to any petition under Article 226 of the Constitution of India before any Hon'ble High Court or under any jurisdiction of the Hon'ble Supreme Court"

12. A perusal of the above order shows that taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the company and 348 group companies, interim stay has been granted by the NCLAT which has been confirmed on 15.10.2018, in respect of



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institution or continuation of suits or any other proceedings by any party or person or bank of company, etc. against IL & FS and its 348 group companies in any Court of law/Tribunal/Arbitration Panel or Arbitration Authority. However, it is observed that the interim order will continue until further orders and not be applicable to any petition filed under Article 226 of the Constitution of India before any High Court or under any jurisdiction of the Hon'ble Supreme Court. Para 67 talks about cut off date which reads as under:

“67. So far as cut-off date is concerned, for the present 15th October, 2018 being the date of interim order, we accept the cut-off date for distribution of the asset because the said date is the date of initiation of the resolution process of the Companies. Hence, the said date should be treated as initiation of the resolution process of the IL& FS and Group Companies.”

13. A reading of para 67, it is very clear that the cut-off date for distribution of the asset of the respondent company and initiation of the resolution process is 15.10.2018. So what are all the claims that would fall as on 15.10.2018 i.e. cut off date, will be covered under the resolution process and any money lent or any material supplied subsequent to the cut off date 15.10.2018, would not be covered under the resolution process as ordered and confirmed by the NCLAT. When that being the case, in the present case, Letter



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of Award (LoA) for Sub contract was issued by the first respondent to the petitioner on 15.04.2019 which is after the cut off date i.e. 15.10.2018 and hence, the petitioner's claim will not fall under the cut off date and also covered under the resolution process. Therefore, the present claim will fall outside the scope of the resolution process.

14. The contention put forth on behalf of the respondents that the interim order granted by the NCLAT would also cover the present claim is misconceived and not sustainable for the simple reason that if this is accepted, the very intention in granting moratorium and for the initiation of the resolution process to revive the company would be defeated since no new investor will come forward to carry on business with the respondents. It is pertinent to note that the very idea of passing the interim order by NCLAT is to safeguard the larger public interest and economy of the nation and interest of the 3rd respondent company and its group of companies. In the event if this Court rejects the claim of the petitioner, certainly it would not safeguard the larger public interest and economy of the nation and the interest of the 3rd respondent since the present claim will not fall within the cut off date fixed by the NCLAT. Therefore, since the NCLAT has fixed the cut-off date 15.10.2018 for



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commencing the resolution process, all the claims up to the said cut-off date are liable to be undergone the resolution process. Therefore, since the claim of the petitioner arises after the cut off date i.e. 15.10.2018, it does not fall within the scope of the resolution process and it would be a separate claim. Therefore, this Court is of the view that the interim order passed by the NCLAT would not cover and this Court holds that in the event wittingly or unwittingly as if the interim order would also cover the present claim, it would be only on the wrong interpretation without understanding the scheme of the Act and also moratorium provided by the NCLAT.

15. For the foregoing discussion, the contentions raised by the learned counsel for the respondents are not sustainable and hence, this Court is of the view that the petitioners have made out a case for appointment of the Arbitrator.

16. Though the arbitration Clause provides that the dispute shall be referred for settlement by arbitration of three Arbitrators, however, considering the value of the dispute, both the parties have agreed for appointment of a sole Arbitrator for the purpose of adjudication of the dispute.



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17. Accordingly, this Court feels it appropriate to pass the following order:

i) **Hon'ble Mr.Justice V.Bharathidasan, (Retired), Madras High Court, residing at No.22(L-45), 2nd Main Road, Kamaraj Nagar, Thiruvanmiyur, Chennai – 600 041. (Mobile No.9444383139),** is appointed as the Arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties.

ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the Order without influencing any of the observations made by this Court in this order.

iii) Learned Arbitrator is requested to conduct arbitration proceedings in accordance with the Madras High Court Arbitration Proceedings Rules, 2017 and the fee of the learned Arbitrator shall be fixed in accordance with Madras High Court Arbitration Centre (MHCAC) (Administrative Cost and Arbitrator's Fees), Rules 2017.

iv) In the event of non-appearance of the respondents herein, the petitioner herein shall bear the entire remuneration and other expenses and thereafter, they can



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recover the same directly from the respondents.

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KRISHNAN RAMASAMY, J.

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17. This Original Petition is ordered accordingly, leaving the parties to bear their own costs. Since this Court has appointed an Arbitrator, it is open to the parties to raise all the issues, which have been put forth before this Court and the learned Arbitrator is directed to decide the issue between the parties on his own, without taking any observation made in this order.

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20.04.2023

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